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SALES AND TITLES UNDER DEEDS OF TRUST.

(CONCLUDED.)

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SEC. 14. *Who must execute the power—Acceptance and resignation of trusts—Death of trustee or donee of power.*—Where the power of sale is executed by the person named, no question can arise. Questions more frequently occur where vacancies have been occasioned by removal, death, resignation, or refusal to act.

The law will not compel any person to accept the office of a trustee; and before acceptance, he may refuse or disclaim the office at will. But after acceptance (which may be shown by any evidence showing his assent to the trust: *supra*, sec. 6), he cannot resign or lay it down without the assent of the beneficiary or the decree of a Court of equity: *Drane* vs. *Gunter*, 19 Ala. 731; 3 Yerg. 257. And will be compelled to concur in ministerial acts requisite for the proper discharge of the trust: Hill on Trust. 307, 545, 551; 21 Ill. 148.

A naked power to sell, not coupled with an interest, must be executed by all, and does not survive. But when coupled with an interest or a trust (see sec. 9, *supra*), it does survive; and if a portion of the trustees renounce or refuse to execute the trust, or from any cause be duly discharged under a power in the deed or under a decree of Court, the legal title to the estate, as well as the office of trustee, will devolve upon the others who do accept the trust, and these may execute it: *Williams* vs. *Otey*, 8 Humph. 562; 2 Id. 367; Hill on Trust. 175; 3 Paige 420. If all decline but one, he may execute it: *Taylor* vs. *Benham*, 5 How. (U. S.) 233; *Scull* vs. *Reeves*, 2 Green Ch. 84. So on the death of part of the trustees, the survivors take the entire legal estate, and may execute the trust. And this though it is not expressly so provided in the deed: *Hannah* vs. *Carrington*, 18 Ark. 104; *Parsons* vs. *Boyd*, 20 Ala. 118; 12 Ala. 672; 10 Peters 532; *Franklin* vs. *Osgood*, 14 Johns. R. 527. On the death of the last trustee, his interest vests in his executor or heir, according to the nature of the property: in the heir, if real property, in the executor, if personal estate. And this although the statute may give to the Courts

a cumulative right to appoint trustees in the place of those deceased: *Mauldin* vs. *Armistead*, 14 Ala. 708, and cases; Hill on Trust. 175.

On the death of the trustee named, a substituted trustee does not take the legal estate, but it passes, according to the opinion of the Supreme Court of the United States, to the heirs at law of the first trustee, and hence, such heirs must be parties to proceedings in Court relative to the execution of the trust and the conveyance of the estate: *Greenleaf* vs. *Queen*, 1 Peters 138. Other Courts hold that on the appointment of a new trustee (even where the statute and decree making the appointment are silent as to any change or transfer of the title), the title or estate vests by *implication* in the new trustee appointed by the court, so as to enable him to perform the trusts: *Woolridge* vs. *Planters' Bank*, 1 Sneed 297; *Goss* vs. *Singleton*, 2 Head 67; *Gibbs* vs. *Marsh*, 2 Met. 243, 253; *Duffy* vs. *Calvert*, 6 Gill 487.

If the power of sale is given to the creditor, "his *administrators* and assigns," the power, not being destroyed by death of the donee thereof, may be carried into effect by his administrator: *Doolittle* vs. *Lewis*, 7 Johns. Ch. 45; *Turner* vs. *Johnson*, 7 Ohio 216, 220, part 2; *Collins* vs. *Hopkins, Adm'r.*, 7 Iowa 463; *supra*, sec. 9. And if the mortgagee, in such a case, dies non-resident, his administrator, by virtue of his foreign appointment, may legally execute the power of sale: *Doolittle* vs. *Lewis*, *supra*. The administrator of mortgagee may sign notices of sale: 4 Minn. 25.

The power of sale, being an irrevocable part of the security (*supra*, sec. 9), is not destroyed by an assignment of the debt, but the benefit of the power passes to the assignee, who has a right to call upon the trustee to sell. If part of the notes are assigned, the security passes *pro tanto*: *Sargent* vs. *Howe*, 21 Ill. 148; *Keyes* vs. *Wood*, 21 Verm. 331, 550; 20 Ill. 162; 1 Paige 48; 11 Iowa 211; Id. 580; *Anderson* vs. *Bumgartner*, 27 Mo. 80, where nature of assignee's interest, and how it may be lost, are discussed; *Wood* vs. *Snow*, 1 Mich. 128; 29 Miss. 46; 4 Kent's Com. 147; *Slee* vs. *Manhattan Company*, 1 Paige 48. See *Wilson* vs. *Troup*, 2 Cow. 195; s. c., 7 Johns. Ch. 25, holding that *partial* assignee

of mortgagee with power of sale, cannot sell, the power being indivisible.

SEC. 15. *When all the trustees must concur.*—Where no different provision is made by the author of the trust, the general rule is that all the trustees must join in executing the trust; but not, of course, those who have renounced or been discharged. The concurrence of a co-trustee is, however, sometimes presumed: *Vandever's Appeal*, 8 W. & S. 405; Hill on Trust. 305, *et seq.*, and note. When concurrence is necessary, or otherwise, see, in addition, 9 Sm. & Mar. 339; 13 Id. 597.

Where empowered to act separately, yet if they elect to act jointly, as by giving a joint notice of sale, one cannot afterwards deny the authority of his co-trustee, and act alone,—certainly not where there is no room to presume the concurrence of the co-trustee: *White* vs. *Watkins*, 23 Mo. 423. The power to sell must be pursued with precision. And the rule may be stated generally thus: where the act to be done requires discretion, or joint deliberation, or united judgment, all must act, unless otherwise specially provided. It was accordingly held in *Powell* vs. *Tuttle*, 3 Comst. 396, overruling *King* vs. *Stone*, 6 Johns. Ch. 323, where loan commissioners were authorized to advertise and sell on default, that a sale by *one* (there being no provision that a less number might act), without the presence and concurrence of both, was for that reason void, and not capable of being rendered valid by a conveyance in which *both* commissioners subsequently unite. See, also, *Sherwood* vs. *Reade*, 7 Hill 431; *Vandever's Appeal*, 8 W. & S. 405.

SEC. 16. *New trustees, how created—by chancery and under the power.*—When, from any cause, a vacancy in the office of a trustee occurs, it may be filled, 1st. By the appointment of a Court of Chancery; 2d. Under a power contained in the trust instrument. Where the trustees named die, neglect or refuse to act, or remove from the State, or from any cause, such as lunacy (2 Barb. Ch. 381), confirmed intemperance (1 Halst. Ch. 513), become incapable of acting, or where they have been guilty of breaches of trust, or have combined to defraud the creditor, Courts of equity freely

exercise their jurisdiction to appoint new trustees: *White* vs. *Hampton*, 10 Iowa 238; *Gale et ux.*, R. M. Charlt. 109; 3 Green Ch. 13; 2 Story Eq. 527; Lewin on Trust. 597; *Gamble* vs. *Dabney*, 20 Texas 69; 14 Ala. 708; *Drane* vs. *Gunter*, 19 Id. 731; *Cullum* vs. *Bank of Mobile*, 23 Id. 797; Hill on Trust. 191, note and cases; 2 Bland Ch. 167, 322, 434; *Sturges* vs. *Knapp*, 31 Verm. 1. Or will compel the trustees named to proceed and sell: *Sargent* vs. *Howe*, 21 Ill. 148; Hill on Trust. 307.

If there is a power contained in the trust instrument authorizing it, new trustees may be created or appointed by those persons or officers to whom the power is expressly given, and in the manner therein pointed out, but not otherwise.

In many instruments which have fallen under our observation, the power of appointment in case of the death or refusal of the trustee to act, is conferred upon the county or probate judge, or some other *permanent* officer. Where the power exists, and is properly exercised, the appointment is valid, even when made by the creditor himself. The designated mode must be followed; but it is sufficient if the intent of the author of the power is fairly executed. Thus, where creditors have the power to substitute a trustee, and are not required to unite in the same instrument, they may make the appointment by separate instruments, executed at different times, if this does not contravene any expressed intent of the grantor: *Crosby* vs. *Huston*, 1 Texas 225. So if the deed gives the *cestui que trust* power, on the failure or refusal of the trustee to act, to appoint another, without requiring it to be in writing, such appointment, where the property to be sold is personal, may be by *parol;* and where the debts are due in instalments, the power is not exhausted by one appointment: *Foster* vs. *Goree*, 4 Ala. 440.

SEC. 17. *Liability for acts of co-trustee.*—This liability is not so stringently enforced in this country as it would seem to be in England. In the absence of agreement or fraud, one trustee is not generally liable for the act of his co-trustee. In a case arising under an instrument such as we are now considering, C. J. MARSHALL stated the rule in this wise:—In a fair, *regular* transaction

one trustee is not liable for money received by his co-trustee merely because he joined in the receipt. But if the transaction is not fair and regular, as where the trustee who receives the money had no right to receive it, the co-trustee who joins in the receipt and thus co-operates in a breach of the trust, will be liable for the failure of the trustee thus receiving it to pay it over to the beneficiary.[1] *Wallis* vs. *Thornton*, 2 Brockenb. 422; 2 Ala. 86.

The rule as stated by Mr. Story (Eq. Jurisp. sec. 1280) is very generally followed. This subject not being entirely within the scope of this article, we refer generally for full discussion both as to directory and discretionary trusts, to *Tounsley* vs. *Sherburne*, 2 Lead. Cas. Eq. 306; Wharton's note to Hill on Trust. 309; *Deaderick* vs. *Cantrell*, 10 Yerg. 263; *McMurray* vs. *Montgomery*, 2 Swan 374; 1 H. & G. 11; 7 Gill & J. 157; 3 Gill 366; *Griffin* vs. *Macaulay*, 7 Gratt. 476; *Worth* vs. *McAdden*, 1 Dev. & Batt. (Eq.) 199.

SEC. 18. *Compensation of trustees, and who liable therefor.*— While the subject of the *compensation* of trustees does not strictly come within the purpose of this article, a brief reference to some of the cases arising under deeds of trust may be useful. If the instrument provides for compensation, that governs. But if no such stipulation is made, the trustee is not entitled to compensation for responsibility assumed or to commissions for making sale. He will be allowed necessary expenses, including in proper cases attorney's fee, auctioneer's and clerk's hire, but the court will guard the fund with jealous care even as to these: *Constant* vs. *Matteson*, 22 Ill. 546; *Allen* vs. *Robbins*, Am. L. Reg., Vol. 2 (N. S.) 442.

Where the trust deed provided no compensation, and the trustee performed no service and the debtor voluntarily paid the debt, the

1 As to liability to beneficiary, see generally, Lewin on Trusts, 2 Law Lib. 186. If the trustee in making the sale is guilty of a flagrant breach of trust, and the property is sold to a third person *bonâ fide*, the trustee may be charged with the full value of the property sold. *Hunt* vs. *Bass*, 2 Dev. (Eq.) 292; *Johnson* vs. *Eason*, 3 Ire. (Eq.) 330.

Liability of mortgagee to debtor for improper exercise of the power to sell, see *infra*, Sec. 20 and note.

trustee has no claim for commissions or compensation against the latter: *Wetmore* vs. *Brown*, Am. Law Reg., Vol. 2 (N. S.) 125. If the trustee, by direction of the creditor, advertises the premises and incurs expenses improperly, as when nothing is due or payable by the terms of the conveyance, he must look for payment for such services and expenses, to the creditor, and not the borrower: Id.

Merely being named as trustee in a deed of trust—no service being performed—does not raise an implied promise on the part of the beneficiary to pay him commissions or otherwise: *Catlin* vs. *Glover*, 4 Texas 151.

If a much larger sum is claimed in the published notice of sale than is due, the court will not compel the debtor to pay the expense of advertising: *Vechte* vs. *Brownell*, 8 Paige 212.

For proper charges and allowances the trust property is liable: *Constant* vs. *Matteson*, 22 Ill. 546; *Allen* vs. *Robbins*, 2 Am. Law Reg. (N. S.) 442. But the employee of trustee has no lien on the trust estate: *Jones* vs. *Dawson*, 19 Ala. 672. So a promise of extra compensation made by the debtor to the trustee at the sale, is a personal claim against the promissor, and cannot be taken out of the proceeds of sale:[1] 3 Md. 323.

SEC. 19. *Trustees must act in person—What duties they may delegate.*—The trustee must act personally, and cannot delegate any substantial part of his duties unless an express authority for that purpose is conferred in the instrument creating the trust: *Doe* vs. *Robinson*, 24 Miss. 688; Hill on Trust. 175. He is incapacitated from delegating any duty (unless the power is expressly given) which involves the exercise of any discretion or judgment. But if a particular thing is specially directed to be done in a prescribed manner, not requiring the exercise of judgment or discretion, he may as to this act by another:[2] *Singleton* vs. *Scott*, 11

[1] On the general subject of compensation of trustees, see leading case of *Robinson* vs. *Pett*, and note by Mr. Rawle, L. Cas. in Eq, Vol. 2, pt. 1, p. 301; *Schwartz* vs. *Wendell*, Walk. Ch. R. 267; 25 Ala. 426; *Burr* vs. *McEwen*, 1 Bald. 154, 163; 2 Stockt. Ch. 263; 4 Harr. 154; *Miller* vs. *Beverly*, 4 Hen. & Munf. 415; 2 Dev. (Eq.) 195; Id. 329; 8 Ire. (Eq.) 62; Id. 222; 6 Id. 137; 9 Rich. Eq. 474.

[2] *Singleton* vs. *Scott*, above cited, which goes as far perhaps as can properly be

Iowa 589; *Pearson* vs. *Jamison*, 3 McLean 197; Id. 69. Mere mechanical or ministerial duties, as, for example, causing advertisements of sale to be fixed up, may be done by others: *Powell* vs. *Tuttle*, 3 Comst. 396.

SEC. 20. *Trustee must act in good faith,—impartially, and with diligence and reasonable discretion.*—The trustee, or mortgagee with power of sale, is bound to act in good faith and take care of and look to the interests of *both* parties, in the execution of the power. "Trustees should consider themselves impartial agents for both parties, and act in all sales for the interest of the debtor as well as the creditor." If a discretion is left with the trustee he must exercise it in a reasonable manner. If he unnecessarily or unfairly prejudices the rights or interests of the debtor, the sale will be set aside (as to which see *infra*, secs. 32–38) or he will be personally responsible for the injury. He should not permit the creditor to *force* the sale at an inadequate price in the absence of other bidders, and should postpone the sale (*infra* sec. 29) if necessary to obtain a fair price: *Quarles* vs. *Lacy*, 4 Munf. 251; *Rossett* vs. *Fisher*, 11 Grat. 492; *Lane* vs. *Tidball*, 1 Gilmer (Va.) 132; 11 Leigh 556; *Hunt* vs. *Bass*, 2 Dev. (Eq.) 292; *Johnson* vs. *Eason*, 3 Ire. Eq. 330; *Singleton* vs. *Scott*, 11 Iowa 589, 597; *Jenks* vs. *Alexander*, 11 Paige 619; *Outwater* vs. *Berry*, 2 Halst. (Ch.) 63; *Richards* vs. *Holmes*, 18 How. 143. Not only must he use good faith, but the same authorities teach that he must use every requisite degree of diligence to bring the property to sale under the best possible circumstances, at least so far as required by his powers. Of course if the instrument directs how he shall proceed, and he has no discretion, it is sufficient if he fairly and fully complies with its requirements. Still as to the time and

done, well illustrates the rule. Here the holder of the note, without consultation with or prior authority from the trustee, published a notice of sale, selected the newspaper, and fixed the time of sale. The trustee was informed of this a day or two before the sale, and was present and made the sale in person. As the instrument expressly fixed the *place* of sale, the terms, the length of notice, the court held that the trustee had no discretion except to select the newspaper and fix the time, and that his subsequent adoption of the selection made and time fixed, placed the case upon the same footing as if the trustee had acted in person from the beginning. 11 Iowa 589.

manner of sale, including the right to postpone when necessary, &c., there is usually some inherent or implied discretion, and this must be exercised with fair and impartial attention to the interests of all parties concerned. This subject will receive constant illustration as we proceed. We therefore dismiss it here by briefly quoting from two illustrious Judges, one in England and the other in this country. The Vice-Chancellor in the quite recent case of *Mathie* vs. *Edwards*, 2 Coll. 465 (A. D. 1846), holds this language, and it is equally applicable where the power of sale is exercised by a third person: "A mortgagee having a power of sale cannot as between him and the mortgagor exercise it in a manner merely arbitrary, but as between them is bound to exercise some discretion; not to throw away the property, but to act in a prudent and business-like manner with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable." See, also, *Hobson* vs. *Bell*, 2 Beav. 17.

The mortgagee, says the late C. J. SHAW, 3 Met. 311, "in exercising the power becomes the trustee of the debtor and is bound to act *bonâ fide* and to adopt all reasonable modes of proceeding in order to render the sale the most beneficial to the debtor."[1] See, also, *Goldsmith* vs. *Osborne*, 1 Edw. Ch. 561; *Driver* vs. *Fortner*, 5 Port. (Ala.) 9. When equity will interfere to control discretion of trustee, see *Prewett* vs. *Laud*, 36 Miss. 495; 11 Gratt. 348; Hill on Trust. 715, 725.

SEC. 21. *Powers of sale strictly construed and must be precisely pursued.*—"Those," says HARRIS, J., in *Powell* vs. *Tuttle*, 3 Comst. 396, "who are invested with the power of transferring one man's property to another must pursue their authority with preci-

[1] Where after power of sale has been exercised by the mortgagee he brings suit for the balance due on the note, it is a good defence to show that the sale was fraudulently managed, and that with proper management the pledged property would have been sufficient to pay the whole debt: *Howard* vs. *Ames*, 3 Met. 308. And this defence is not avoided by the fact that the mortgagor has the right of redemption: *Lowell* vs. *North*, 4 Minn. 32. But if he acts fairly he is only accountable for what he realizes at the sale, and may sue for and recover balance of his debt: *Sabin* vs. *Stickney*, 9 Verm. 164.

sion, or what they do will be invalid." Indeed the principle is undisputed and fundamental, that directions in powers of sale must be strictly, literally, and precisely pursued, and admit of no equivalent or substitution, however unessential they might otherwise have been: *Waldron* vs. *Chasteny*, 2 Blatchf. 62; *Crosby* vs. *Huston*, 1 Texas 225; *Taylor* vs. *Akins*, 1 Burr. 60; *Gunter* vs. *Janes*, 9 Cal. 643; *Hawkins* vs. *Kemp*, 3 East 410; 10 Mo. 75; 1 Id. 520; 4 Kent Com. 147; *infra*, sec. 25. So strict is this rule that the trustee cannot pursue any other mode than the designated one, though he thereby promotes the interest of those for whom he acts: *Greenleaf* vs. *Queen*, 1 Pet. 138. Trustees derive their power solely from the deed (*supra*, sec. 8), and if the power is not thus strictly pursued the debtor is not barred of his equity of redemption by the sale. See, in addition, *Ormsby* vs. *Tarascon*, 3 Litt. 405; *Bush* vs. *Stamps*, 26 Miss. 463; *Gray* vs. *Howard*, 14 Mo. 341; *Beebe* vs. *De Baum*, 3 Eng. 510; *Foster* vs. *Goree*, 4 Ala. 428.

If the mode is not defined and the power is *general*, it is an authority to act in any mode which the law would sanction or give effect to: 1 Sugd. on Pow. 266; *Foster* vs. *Goree*, 4 Ala. 441; Id. 483.

But where, as is usually the case, the manner is particularly prescribed in the deed, or, as in some of the states, by statute, this must, as we have shown above, be followed. A negative upon any other mode of executing the power is implied by the designation of a specific mode.

SEC. 22. *Same subject—The principle applied and illustrated.*— It follows that a power to *sell* on default will not include the power to lease or mortgage:[1] 4 Kent Com. 148; *Walker* vs. *Brungard*, 13 Sm. & Mar. 723. So if there are conditions precedent, these must be complied with or the sale will not be valid: *Roarty* vs. *Mitchell*, 7 Gray 243; *Dutton* vs. *Cotton*, 10 Iowa 408. So, if the trust is to sell partly for *cash* and partly on credit, a sale *wholly*

[1] So if the trust property is slaves and the trustee is authorized to sell only, he cannot apprentice them, and if he does he must account for the value of their services: *Sparks* vs. *Kearney*, 2 Jones (Eq.) 481.

for cash will be set aside and a resale ordered: *Norman* vs. *Hill*, 2 Patton & Heath 676. Where the power is to sell for sufficient to pay the amount "then due at the time of such sale," a sale for an instalment due and for one *not* then due, is void and will be set aside even where a stranger purchases:[1] *Ormsby* vs. *Tarascon*, 3 Litt. 405. But if the trustee is empowered to sell on default of the payment of *interest*, the sale will be valid though the principal is not yet due: *Richard* vs. *Holmes*, 18 Howard (U. S.) 143. If the prescribed mode is a *public* sale, the trustee cannot sell at private sale: *Greenleaf* vs. *Queen*, 1 Pet. 138. Sureties if so authorized by the power may sell before being damnified, but if *they* become the purchasers the debtor may redeem from them or their grantees with notice: *Thurston* vs. *Prentiss*, 1 Mich. 194; s. c. Walk. Ch. R. 529. Further as to rights of sureties indemnified by deed of trust, see *Hawkins* vs. *May*, 12 Ala. 673; 5 Port. (Ala.) 191; 15 Ala. 563; *Roden* vs. *Jaco*, 17 Ala. 344; *Wheeler* vs. *Stone*, 4 Gill 38; *supra*, sec. 7.

As to powers of sale to secure future advances, see *Curling* vs. *Shuttleworth*, 6 Bing. 121. See Redfield's valuable article in Am. Law Reg., Vol. 2 (N. S.), p. 1, as to validity, &c., of mortgages, for this purpose.

SEC. 23. *A valid, subsisting power lies at the foundation of the purchaser's title.*—Trustees and mortgagees with power of sale deriving their power as we have seen (*supra*, secs. 8, 15) solely from the deed under which they act, it follows that a valid power is necessary and lies at the very foundation of the purchaser's title. If, therefore, the power has been extinguished by payment or otherwise, no title will pass at a sale under it even to a *bonâ fide* purchaser: *Cameron* vs. *Irwin*, 5 Hill (N. Y.) 272; Id. 246; 2 Id. 566; 21 Mo. 320; *Ledyard* vs. *Chapin*, 6 Port. (Ind.) 320; *Sherman* vs. *Sherman*, 3 Port. (Ind.) 337; *Wade* vs. *Harper*, 3 Yerg. 383; *supra*, sec. 10. And because payment of the debt

[1] Mode of proceeding on sales where some of the instalments are not due or fall due at different times: *Cox* vs. *Wheeler*, 7 Paige 248; *Mussina* vs. *Bartlett*, 8 Port. (Ala.) 277; 9 Id. 547; 1 Ala. 380; 1 Rand. 466; 1 Hopk. Ch. Rep. 569; *Holden* vs. *Gilbert*, 7 Paige 208.

renders the instrument *functus officio* and *ipso facto* extinguishes the power of sale, such *bonâ fide* purchaser takes no title even though there has been no release, reconveyance, or other discharge of the instrument of record.[1] See, in addition to cases last cited, *Francis* vs. *Porter*, 7 Port. (Ind.) 213; 18 Johns. 7, 12; 21 Wend. 483; 26 Id. 541; 21 Ill. 149; 20 Ill. 165; Willard's Eq. 433; *Perkins* vs. *Dibble*, 10 Ohio 433, 439; *Taverner* vs. *Robinson*, 2 Rob. (Va.) 280; *Furbish* vs. *Goodwin*, 5 Foster 426. So if the trustee has once sold enough to pay the debt, the power being thereby extinguished, he cannot legally sell more: *Charter* vs. *Stevens*, 3 Denio 33. And if the sale is a *nullity*, this may be set up even against a purchaser for value: *The State, &c.*, vs. *The Bank, &c.*, 5 Ind. 353. But no mere delay, even for ten years, if the debt be still enforceable, will discharge the trust: *Galt* vs. *Dibbrell*, 10 Yerg. 146. And a deed of trust to sell to pay a note, if suit be brought on it, may be executed though the note is turned into a judgment, and more than six years have elapsed: *Bank, &c.*, vs. *Guttschlick*, 14 Pet. 19.

The power exists, and may be executed by a sale although the creditor has a bill to foreclose pending at the time: *Brisbane* vs. *Stoughton*, 17 Ohio 482; *Wilson* vs. *Troup*, 2 Cow. 195; s. c. 7 Johns. Ch. 25. But if (as it seems he may do) he proceeds concurrently by suit at law and by proceedings under the power, a

[1] But a trustee can only receive payment (where the note is payable to the beneficiary) when so authorized by the deed of trust. If by the instrument he is authorized to receive money only *when due* and upon *sale* being made, payment to him before due and without sale, the beneficiary not consenting, will not be good, nor discharge the lien in equity: *Wallis* vs. *Thornton*, 2 Brockenb. 422. If intrusted with possession of the note this might give an independent authority to receive payment.

Whether reconveyance is necessary; mode of release and satisfaction; by whom to be made, &c., see, in addition to authorities in the text, *Wolfe* vs. *Donnell*, 13 Sm. & Mar. 103; *Smith* vs. *Doe*, 26 Miss. 291; 1 Freem. Ch. 105; *Howard* vs. *Gresham*, 27 Geo. 347; 3 Id. 345; *Perkins* vs. *Sterne*, 23 Texas 561; *Harrison* vs. *Hecks*, 1 Port. (Ala.) 423; 16 Ala. 738; *Lawrence* vs. *Farmers' Ins. Co.*, 3 Kern. 214; 22 Mo. 459; *Ryan* vs. *Dunlap*, 17 Ill. 40; *Hannah* vs. *Carrington*, 18 Ark. 106; *Magee* vs. *Carpenter*, 4 Ala. 469; 3 Stew. & Port. 397; 1 Texas 239 *et seq.*; 4 Kent Com. 193; *Briggs* vs. *Davis*, 20 N. Y. 15; 1 Jones (Law) 169; 7 Ire. (Law) 418.

subsequent judgment and collection of the amount on execution will be held to be an election to abandon all prior proceedings under the trust deed: *Yourt* vs. *Hopkins*, 24 Ill. 326. Further as to election of remedies; see *Fay* vs. *Valentine*, 5 Pick. 418.

SEC. 24. *Same subject—Exception in favor of bonâ fide purchasers under usurious and fraudulent securities.*—There is an important exception to the rule stated in the last section as to the necessity of a valid power. It is held that a purchaser for a valuable consideration, without notice, at a sale made under a power, has a good title notwithstanding the mortgage is usurious, and the statute declares the usurious contract and security *utterly void: Jackson* vs. *Henry*, 10 Johns. 185; *Monell* vs. *Lawrence*, 12 Johns. 521; *Thurston* vs. *Prentiss*, 1 Mich. 197.

But it is otherwise if the usurious creditor himself becomes the purchaser, or if the purchaser though a stranger to the usurious contract has notice:[1] *Jackson* vs. *Dominick*, 14 Johns. 435.

So a *bonâ fide* purchaser for value and without notice under a deed of trust not void on its face, is not affected by any intended fraud of the grantor in the deed of trust: *Ewing* vs. *Cargill*, 13 S. & M. 79; 3 Mason 465; *Blair* vs. *Bass*, 4 Blackf. 539.

SEC. 25. *Of the notice of sale—Necessity—Object—Directions of power to be strictly complied with—Fraudulent notices, &c.*—The grantor may authorize a valid *private* sale without notice, but

[1] The leading case is *Jackson* vs. *Henry, supra.* Although there is a statute in New York protecting *bonâ fide* purchasers, yet KENT, C. J., puts the decision, which has ever since been adhered to, upon general principles of public policy and the security of titles. He says—10 Johns. 196—if the party instead of arresting the sale "suffers it to go on and an innocent party to purchase, unconscious of the latent defect and without any means of knowing it, the purchaser has the preferable claim in equity to protection." The principle of *Jackson* vs. *Henry*, which is that a power to sell under an usurious security is not void to all intents and purposes, should not, in the opinion of Mr. Justice COWEN (5 Hill 276), be extended. See also 14 Johns. 441; 2 Hill 566. Hence it is held that if the purchaser at the mortgage sale is not *bonâ fide*, and he has not obtained possession, he can convey no better title than he acquired, and therefore the grantee of such purchaser, although for value and without notice, is not protected from the plea of usury by the creator of the power. And possession by the latter in such a case, is, *it seems*, sufficient constructive notice to third persons of his rights: *Hyland* vs. *Stafford*, 10 Barb. 558.

this right is held to be impliedly abolished by statutes which direct and regulate *public* sales under powers: *Lawrence* vs. *The Farmers', &c., Co.*, 3 Kern. 200, 210. The object of notice is that the property may be advantageously sold. If proper notice is not given, whether directed by the power or not, Chancery will set aside the sale: 4 Kent 190; *Anon.*, 6 Madd. 15. But if the kind of notice is prescribed no other will do, and no further notice is necessary. Hence if the power simply directs the trustee to advertise in a newspaper, he is not required to give any other kind of notice or personally to notify the grantor or his assigns: *Ormsby* vs. *Tarason*, 3 Litt. 405, 411. So if the statute points out a particular mode of notice, as, for example, that they be posted in a particular place, no other mode, even though it be a better one, can be substituted. Literal and precise conformity is required. If this is impossible the remedy is in Chancery to foreclose by bill: *Dutton* vs. *Cotton*, 10 Iowa 408; *supra*, secs. 21, 22.

If no particular form is prescribed, then no particular form is required:[1] *Newman* vs. *Jackson*, 12 Wheat. 570. If mortgagee is deceased his administrator may sign notice of sale: *Baldwin* vs. *Allison*, 4 Minn. 25; *supra*, sec. 3, and note citing Minnesota decisions.

In the absence of specific directions the trustee is invested with a discretion which must be fairly exercised (*supra*, sec. 20). Thus if the direction is to give notice for a specified time in "*the newspaper*" (not naming what paper, or where published), the trustee has a discretion to select the paper, and if he acts fairly he may make a valid sale: *Singleton* vs. *Scott*, 11 Iowa 589; 12 Wheat. 570, *supra*. If he has a discretion as to where notices shall be posted he must act in good faith (see above, section 20), and if he fraudulently post them in remote places the sale will be avoided or the trustee made personally responsible: *Johnson* vs. *Eason*, 3

[1] Notice as follows:—"By virtue of a deed of trust to the subscriber" (not stating by whom made) "for the security of certain moneys therein mentioned, will be exposed at public sale on," &c., (naming the day) "the following described property. Sale to take place on the premises. T. M. G., Trustee:—held, sufficient, 12 Wheat. 570. Sufficiency of notice under New York Statute, see *Judd* vs. *O'Brien*, 21 N. Y. 186; 2 Cowen 195.

Ired. (Eq.) 330. So where the notice is fraudulently advertised in a remote paper: *Jencks* vs. *Alexander*, 11 Paige 619. The writer at *Nisi Prius* set aside a sale where the notice was in the English language, but inserted in a paper printed in the German language. This was almost no notice at all, and gave less publicity than if it had all been in the latter tongue, as those among whom the paper circulated could not read the notice, while those who could read the latter generally did not and could not read the former.[1]

Where the length of time is regulated by statute the legislature may constitutionally reduce the time, as from 24 to 12 weeks, even as to existing mortgages: *James* vs. *Stull*, 9 Barb. 482; but no subsequent law can be made which will injuriously affect the substantial rights of the creditor: *Bronson* vs. *Kinsie*, 1 How. (U. S.) 311; 7 Blackf. 613; Id. 154; *supra*, sec. 3 and note.

SEC. 26. *Notice—Certainty and requisites as to Place—Time—Description.*—The notice should be certain as to *place* of sale (*Burnet* vs. *Denniston*, 5 Johns. Ch. 35) and *time* of sale (*Gray* vs. *Howard*, 14 Mo. 341; 4 Minn. 437), and the *description* of the land must be sufficient reasonably to apprise the public of the property intended to be sold: *Newman* vs. *Jackson*, 12 Wheat. 570. Omissions or inaccuracies in these respects, not calculated to mislead and working no prejudice, will be disregarded. Thus a sale was sustained where the notice of sale was for "the 28th of December next," not naming the year:[2] 14 Mo. 341. So the Court refused, under special circumstances, the town being small and no injury being shown, to set aside a sale where the property was advertised to be sold at "the town of St. Joseph:"[3] *Beattie*

[1] Where notice of sale was given for the 23d of May and the notice was afterwards changed to the 25th of May without debtor's knowledge, he attending at the time first fixed, it was held that a sale on the day last named conferred no title: *Dana* vs. *Farrington*, 4 Minn. 433; *infra*, secs. 28, 29.

[2] It is better to specify the precise hour, but a notice specifying a certain day *between* 12 *and* 5 *o'clock* was, in the absence of fraud or unfair practice, sustained: *Cox* vs. *Halstead*, 1 Green Ch. R. 311.

[3] Notice of sale at "City Hall" or "Merchant's Exchange" is good, as by usage such sales take place at the rotunda of those buildings; but to be good they must take place at the rotunda: *Hornby* vs. *Camer*, 12 How. Pr. Rep. 490.

vs. *Butler*, 26 Mo. 313. So as to inaccuracies of *description* which would not mislead, or which stand self-corrected on the face of the notice: 12 Wheat. 570, *supra*; *White* vs. *Malcolm*, 15 Md 529; *Rathbone* vs. *Clark*, 9 Abbott's Pr. Rep. 12, 66, note. In computing time, one day is to be excluded and the other included: *Bunce* vs. *Reed*, 16 Barb. 350.

Notice of a sale "once in each week for at least twelve successive weeks," is not given by twelve weekly insertions unless the first preceded the sale eighty-four days or twelve full weeks: *Early* vs. *Doe*, 16 Howard (U. S.) 610; *Bunce* vs. *Reed*, 16 Barb. 350; 4 Peters 349; 1 Wend. 90.

If "thirty days' notice" is required, thirty days must elapse between the first publication and the day of sale; and it was further held, overruling *contra dictum* in 3 G. Greene 433, that it was not necessary that thirty days should elapse between the first and last publication: *Leffler* vs. *Armstrong*, 4 Iowa 482. And the publication must be in each week or number of the paper; that is, the publication must be *continued* for the requisite period: 4 Iowa 482; 3 G. Greene 433; 16 Barb. 350; 10 Mo. 75. "Twenty days' notice in two daily newspapers" was required. Held not to require twenty days' *daily* notice, or that the notice should be inserted twenty times in two daily papers: *White* vs. *Malcolm*, 15 Md. 529. See, also as to notice, *Johnson* vs. *Dorsey*, 7 Gill 286; *Gibbs* vs. *Cunningham*, 1 Md. Ch. 44.

SEC. 27. *Notice—Requisites of, as to truthfulness and amount claimed.*—The notice should be truthful in all material particulars. Where the notice stated that the premises would be sold for default of *three* mortgages, when in fact there were but two, the sale did not bar the equity of redemption: *Burnet* vs. *Denniston*, 5 Johns. Ch. 35; *Johnson* vs. *Turner*, 7 Ohio, part 2, p. 216. See *Mathie* vs. *Edwards*, 2 Coll. 465, a striking case of a notice calculated to mislead. Claiming too much to be due in the notice does not make the sale void—certainly not if the excessive claim is not made for a fraudulent purpose. It may afford ground, on a proper case being made, to set aside the sale:[1] *Klock* vs. *Cronkhite*, 1 Hill

[1] Where the amount claimed in the notice exceeded by more than one-half the amount due, the sale was set aside: *Spencer* vs. *Anon.* 4 Minn. 542.

107; *Jenks* vs. *Alexander*, 11 Paige 619; *Bunce* vs. *Reed*, 16 Barb. 347. Sale is not void because the notice does not state the amount of the debt: *Wiswall* vs. *Ross*, 4 Port. (Ala.) 321.

SEC. 28. *Notice—Effect of want of.*—If the notice is not published for the requisite length of *time*, the sale is *void*, not merely voidable; no title passes, and the purchaser cannot maintain ejectment or other action: *Bunce* vs. *Reed*, 16 Barb. 350, and cases; *Baldridge* vs. *Walton*, 1 Mo. 520; *Gibson* vs. *Jones*, 5 Leigh 370; *Jackson* vs. *Clark*, 7 Johns. 217, 226. And so if the sale is made on the wrong day:[1] *Miller* vs. *Hull*, 4 Denio 104; *Dana* vs. *Farrington*, 4 Minn. 433. But defects in the publication of notice were held to be cured by the lapse of a long time—in one case sixteen years, in another, twenty-four years without objection—the Court supplying the defects by presumption: *Bergen* vs. *Bennett*, 1 Caine's C. E. 1; *Demarest* vs. *Wynkoop*, 3 Johns. Ch. 129. Third persons cannot object that the trustee did not give proper notice; this can only come from the grantor in the deed of trust, or some person who sustained injury: *Wightman* vs. *Doe* (ejectment) 24 Miss. 675; *Hillegas* vs. *Hillegas*, 5 Barr 97; *Casey* vs. *Colvin*, 11 Ala. 514; *Edmonson* vs. *Walsh*, 27 Ala. 578; *Infra* sec. 37.

SEC. 29. *Adjournment of sale—Power implied—When and how exercised.*—The deed need not expressly give the trustee power to adjourn. It is implied unless inhibited. He may adjourn, giving proper notice, not only to a different time, but to a different place: *Richards* vs. *Holmes*, 18 How. (U. S.) 143; *Jackson* vs. *Clark*, 7 Johns. 217, 225; *Sayles* vs. *Smith*, 12 Wend. 57; *Miller* vs. *Hull*, 4 Denio 104; *Baldridge* vs. *Walton*, 1 Mo. 520.

This is a matter of discretion which must be properly exercised; 18 How. 147. If few are present, and the bids low, it is the *clear duty* of the trustee to adjourn: *Johnson* vs. *Eason*, 3 Ired. (Eq.) 336; *supra*, sec. 20.

Regularly, the adjournment should be on the *day* and at the *place of sale*, and the same notice given which is required in the first instance. When *thus* postponed, it need not be for the length

[1] A sale on Sunday, however improper it may be, is yet valid, not being a judicial proceeding, unless prohibited by statute: *Saylcs* vs. *Smith*, 12 Wend. 57.

of time at first required: Per SPENCER, J., 7 Johns. 217, 225.[1] But if notice of postponement before the day of sale be published, and the sale is made on the day originally fixed, it is void and confers no title: *Jackson* vs. *Clark*, 7 Johns. 217. So if the sale is adjourned on the ground, the published notice of such adjournment must conform to the adjournment previously announced, or the sale will be void: *Miller* vs. *Hull*, *supra;* sec. 25, *supra*, note 2. As to republication of defective notice and postponement of sales, see also *Cole* vs. *Moffit*, 20 Barb. 18; *Sayles* vs. *Smith*, 12 Wend. 57; *Westgate* vs. *Handlin*, 7 How. Pr. R. 372.

SEC. 30. *Effect of sale in barring equity of redemption, and cutting off subsequent incumbrancers—Effect of irregular sale, &c.* —In sales under powers, two questions have been made: 1st. Whether the donee of the power could lawfully sell without application to, and the previous order of, a Court of equity. 2. If so, will such sale bar the equity of redemption?

On the first question, as we have seen (*supra*, sec. 3), there was much doubt until it was fully and finally settled in England, in A. D. 1802, by *Clay* vs. *Sharpe*, *apud* Sugd. on Vend., Appendix No. 14. Since then, the validity of such sales without the prior sanction of Court has been unquestioned: *Corder* vs. *Morgan*, 18 Ves. 344; *Sims* vs. *Huntley*, 2 How. (Miss.) 896. *Clay* vs. *Sharpe* also decided that where a sale was regularly made under a power, even though it was without the assent of the owner, and against his resistance, the title passes to the purchaser. And because it is unnecessary that he should do so, a Court of equity will not entertain a bill to compel the owner to join in a deed to the purchaser.

As to the second question above, the law is equally clear. The right to redeem remains *until* the sale is made pursuant to the power, but not afterwards, unless there is a statute, or some extrinsic

[1] The learned Justice suggests the quere whether there could be a postponement *before* the day of sale, unless it be for the full time fixed by the statute or the deed. See also 4 Minn. 433.

Adjournment made at time and place advertised need not be published: *Cox* vs. *Halstead*, 1 Green Ch. 311; S. P. 1 Stockt. 287.

matter of equity:[1] *Corder* vs. *Morgan*, *supra*; *Turner* vs. *Johnson*, 10 Ohio 204; 4 Kent 147; *Eaton* vs. *Whiting*, 3 Pick. 484; *Brisbane* vs. *Stoughton*, 17 Ohio 482; *Bloom* vs. *Rensselaer*, 15 Ill. 506; 7 Johns. Ch. 145; *supra*, sec. 11. The purchaser's title is absolute and irredeemable, and the sale bars even infants, heirs, and married women: *Demarest* vs. *Wynkoop*, 3 Johns. Ch. 129; 7 Id. 45; 10 Ohio 204; *supra*, sec. 5.

As such sale extinguishes the debtor's equity of redemption (*supra*, sec. 11), his only right after the sale is to what surplus may remain after the liquidation of the debt for which the property was sold; and as to the premises, he is a mere tenant at sufferance: *Kinsley* v. *Ames*, 2 Met. 29; *Bank* vs. *Guttschlick*, 14 Pet. 19. The purchaser is entitled to the crops growing on the land at time of sale: *Shepherd* vs. *Philbrick*, 2 Denio 174.

As the object of the sale is to cut off the right of redemption, proceedings to foreclose by notice and sale *conclusively* acknowledge the right to redeem, even though such right would not otherwise exist: *Calkins* vs. *Isbell*, 20 N. Y. 147.

If the statute allows a certain time after sale in which to redeem, then the purchaser acquires an inchoate title, subject to be defeated if redeemed, absolute if not redeemed, in which case it relates back to the time of purchase. When his title is perfected by deed, he may maintain *case* or *trover* for trespasses committed by the mortgagor or others, after the purchase and before the time for redemption expired: *Stout* vs. *Keyes*, 2 Doug. 184; *Rich* vs. *Baker*, 2 Denio 79; 17 Barb. 157; Howard's N. Y. Code 432 (Ed. 1859).

Mere tender within the time does not reinvest mortgagor with the title. If the tender is refused, resort must be had to chancery: *Smith* vs. *Anders*, 21 Ala. 728.

While on this subject, it may be remarked that general statutes

[1] Thus where the trustee or mortgagee has power "to sell to the highest bidder and of the proceeds first to pay," &c., a sale passes an indefeasible and irredeemable estate to the purchaser: *Turner* vs. *Johnson*, 10 Ohio 204; *Johnson* vs. *Turner*, 7 Ohio, pt. 2, p. 216. But the right to redeem is not barred (unless perhaps in the case of a *bonâ fide* purchaser) by a sale made after a tender of the full amount due the creditor and a refusal to accept: *Burnet* vs *Denniston*, 5 Johns. Ch. 35.

allowing redemptions from "sales under decrees of court" have no application to sales made under powers: *Bloom* vs. *Rensselaer*, 15 Ill. 503.

A valid sale under a prior deed of trust cuts off subsequent mortgages and judgments: *Wiswall* vs. *Ross*, 4 Port. (Ala.) 321; *Pahlman* vs. *Shumway*, 24 Ill. 127; *Bodine* vs. *Moore*, 18 N. Y. 347; 9 Iowa 407; *Brown* vs. *Bartee*, 10 Sm. & Mar. 268. In this last case (*Brown* vs. *Bartee*), it was held that a sale even to the beneficiary under a prior deed of trust, cut off a subsequent judgment against the trustor,[1] even though prior to such sale by the trustee, but after the judgment, the trustor has conveyed absolutely to the beneficiary.[2]

A sale under a *junior* deed of trust carries to the purchaser the equity of redemption of the grantor:[3] *Graham* vs. *King*, 15 Ala. 563; *supra*, sec. 11. An attempted sale under a power by which no title passes, will yet amount to an assignment of that part of the mortgage-debt for which the premises were bid off: *Gilbert* vs. *Cooley*, Walk. Ch. 494; *Jackson* vs. *Bowen*, 7 Cow. 13; *Grovenor* vs. *Day*, 1 Clark 109. If the purchaser at a cash sale does not pay the money in a reasonable time, the trustee may treat the sale as a nullity. If such purchaser has been guilty of unreasonable delay in tendering or paying his bid, equity will not enforce specific performance at his instance: *Heur* vs. *Rutkowski*, 18 Mo. 216.

SEC. 31. *The trustee's deed—The title of grantee of trustee—Fraud—Consideration—Covenants.*—The trustee, as we have seen

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1 This word (trustor), the correlative of trustee, "though used in Scotch law, and in itself very significant and convenient, has not been adopted in England, and is rarely used in the United States. See 9 Ire. (Law) 191:" Burrill's Law Dict. Its convenience and appropriateness should secure its general adoption and use.

2 As to rights of subsequent lien-holders under New York Statute, see *Benedict* vs. *Gilman*, 4 Paige 58, Id. 526; *Klock* vs. *Cronkhite*, 1 Hill 107; *Post* vs. *Arnot*, 2 Denio 344; generally, *infra* sec. 40.

3 Equity will not, except under special circumstances, compel the holder of a prior deed of trust, past due, to accept redemption from and to assign the same to the holder of a second deed of trust *not yet due*, as this might enable the latter to oppress the debtor: *How* vs. *Graham*, 21 Mo. 163.

(*supra*, sec. 10), takes the legal title upon a declared trust; and the grantee of the trustee takes the legal title which was before held by the trustee, and such grantee may recover in ejectment without showing that the trustee, in making the sale, complied with the conditions by advertising, &c.: *Reece* vs. *Allen*, 5 Gillman 236. The Court of Appeals in Virginia hold the same doctrine, and go further, and decide that such grantee cannot be defeated in a Court of law, and may recover possession; although the jury specially found that the trustee and purchaser were both guilty of fraud at the time of the sale by the trustee—questions of fraud, unless the deed is absolutely void, belonging to a Court of Chancery, where the sale can be set aside or the purchaser treated as a trustee:[1] *Taylor* vs. *King*, 6 Munf. 358; *Harris* vs. *Harris*, Id. 367; *Gibson* vs. *Jones*, 5 Leigh 370; *Carrington* vs. *Goddin*, 13 Gratt. 601; *Christian* vs. *Yancey*, 2 Patton & Heath 240; *Skipworth* vs. *Cunningham*, 8 Leigh 271; 10 Id. 183; *Stimpson* vs. *Fries*, 2 Jones (Eq.) 156; 7 Ired. (Law) 418; *Newman* vs. *Jackson*, 12 Wheat. 570;[2] *Rowan* vs. *Lamb*, 4 G. Greene 468; 11 Iowa 589. But in equity it is different, as the purchaser takes upon himself the risk of the regularity and fairness of the sale, and on a bill to set it aside he must prove its regularity: *Norman* vs. *Hill*, 2 Patton & Heath 676; *infra*, sec. 36.

At law, the legal title passes by the conveyance of the trustee, although he may be guilty of a breach of trust, or fail to comply with the terms of the trust: *Gale* vs. *Mensing*, 20 Mo. 461; *Bank*,

[1] The fraud to defeat the deed in a court of law must be fraud in the *factum*. Fraudulent representations which may have induced the party to make the deed or fraud in the consideration, do not avoid the deed at law: *Gwynn* vs. *Hodge*, 4 Jones (Law) 168, and cases.

[2] "The conveyance by the trustee is a sufficient title to enable his alienee to recover in ejectment, unless the objection that the trustee's notice was so defective that no title passed to the purchaser is maintainable." Whether the conveyance by the trustee would pass the legal title if there had been *no notice at all*, the court had no occasion to decide: 12 Wheat. 570. That it would not, see *Jackson* vs. *Clark*, 7 Johns. 217, and remarks of Court on page 226, where it is said (the action being ejectment) that the purchaser must show the regularity of the notice and sale as part of his title: *Miller* vs. *Hull*, 4 Denio 104; *King* vs. *Buntz*, 11 Barb. 192; *Sherwood* vs. *Reed*, 7 Hill 431; *Dana* vs. *Farrington*, 4 Minn. 433.

&c., vs. *Benning*, 4 Cranch C. C. R. 81; *Rowan* vs. *Lamb*, 1 G Greene 468. And where the legal title passes, Courts of law cannot take notice of departures of a trustee from the strict terms of his trust. Questions as to whether the power was discreetly or regularly exercised belong to a Court of Chancery: *Rowan* vs. *Lamb*, *supra*; *Singleton* vs. *Scott*, 11 Iowa 589; *Newman* vs. *Jackson*, 12 Wheat. 570; *Waldron* vs. *Chasteny*, 2 Blatchf. 62; *Bayard* vs. *Colefax*, 4 Wash. C. C. R. 38; *Taylor* vs. *King*, and cases, *supra*. But if, as we have seen, proper notice is not given, or the sale takes place on the wrong day, no title passes.

In ejectment by the alienee of the trustee, the plaintiff is not bound, as against the debtor or his assignee or vendee, to introduce evidence to establish the debt secured by the deed of trust or its *bonâ fide* character.[1] The conveyance is presumed to be *bonâ fide*, and its recitals true, unless directly attacked for fraud:[2] *Huntley* vs. *Buckner*, 6 Sm. & Mar. 70; *Brown* vs. *Bartee*, 10 Id. 268.

The law will not compel the trustee to covenant, except against his own incumbrances. Yet if, at the sale, he declares that he can make a good title, he must do so before he can exact the purchase-money: *Ennis* vs. *Leach*, 1 Ired. (Eq.) 416. If, however, the trustee enters into covenants, they will bind him personally: Hill on Trust. 281, note.

SEC. 32. *Setting aside sales—General principles applicable to.*—Being a harsh mode of disposing of the equity of redemption (*supra* sec. 3), sales "should be watched by the courts with a jealous eye, and should not be sustained unless conducted in all fairness and integrity:" Per CATON, J., 15 Ill. 507 "Upon the slightest proof of fraud or unfair conduct, or of departure from the power, they will be instantly set aside," and the party allowed to redeem: *Longwith* vs. *Butler*, 3 Gillman 32, 44. So if proper "notice is not given, or the proceedings be in any way contrary

[1] In *McCain* vs. *Wood*, 4 Ala. 258, and several subsequent cases in the same state, a different but untenable conclusion was reached.

[2] Where the trustee executes the trust by making a sale and deed, his power ceases, and he cannot afterwards bind the parties by a new deed or any recitals or admissions: *Doe* vs. *Robinson*, 24 Miss. 688.

to equity and justice:" Per TANEY, C. J., *Bronson* vs. *Kinsie*, 1 How. 321; 11 Barb. 191; 10 Iowa 408.

If proper persons do not execute the trust (*supra* sec. 14), or the trustees do not act in person (sec. 19) or in good faith, and with the requisite diligence (sec. 20), or if the power has been extinguished (sec. 23), or if proper notices have not been given (sec. 25 *et seq.*), sales made will be set aside on timely application to Chancery: *Rowan* vs. *Lamb*, 4 G. Greene 468; *supra* sec. 31.

It may be useful briefly to illustrate the above general principles. Thus if the creditor deceives the debtor by a promise to extend, and on the faith thereof the debtor goes temporarily away, a sale made in his absence will be set aside: *Schoonhoven* vs. *Pratt*, 25 Ill. 457. But the expression of an erroneous opinion by *third* persons at the trustee's sale that there is a right of redemption, is no ground for setting the sale aside: *Bloom* vs. *Rensselaer*, 15 Ill. 503. But a sale will be set aside if the creditor pursues a course calculated to prevent competition: 3 Gill 32, *supra*. So if sale is made in violation of a valid agreement to extend: 25 Ill. 457. But an innocent purchaser will not be affected by an unrecorded agreement to extend, and mere possession by debtor is no notice of such an agreement: *Beattie* vs. *Butler*, 21 Mo. 313.

Sales will be set aside if the trustee is guilty of fraud or collusion: *Johnson* vs. *Eason*, 3 Ired. Eq. 330; *Jenks* vs. *Alexander*, 11 Paige 619. Or if he makes a sale after tender of full amount due: 5 Johns. Ch. 35. Or if nothing is due: *Wade* vs. *Harper*, 3 Yerg. 383; *Cameron* vs. *Irwin*, 5 Hill 272. So a sale by a trustee, where the amount is altogether uncertain and disputed, ought not to be made, and is liable to be set aside: *Gibson* vs. *Jones*, 5 Leigh 370; 10 Id. 547; 2 Rob. (Va.) 1; *Lane* vs. *Tidball*, 1 Gilmer (Va.) 130; *Infra* sec. 39.

SEC. 33. *Setting aside sales—Inadequacy of price.*—Though the land was duly advertised, and the sale properly made, yet it was set aside for gross inadequacy *alone*, and a resale ordered, the land being worth $500, and having sold for $50: *Wright* vs. *Wilson*, 2 Yerg. 294. Other courts hold that gross inadequacy

alone is not sufficient, applying to trustees' sales the rule as to judicial sales: *Singleton* vs. *Scott*, 11 Iowa 589. If the inadequacy is great, the bidders few, and the trustee has not used diligence and discretion by an adjournment in proper cases (*supra* sec. 29), it seems, on principle, that sales under such circumstances should be set aside if applied for seasonably. But if the inadequacy was occasioned by the acts of the party seeking to set aside the sales, as where he *improperly* forbid others to purchase at the sale, it will not set aside: *Jones* vs. *Neale*, 2 Patt. & Heath 339; *Forde* vs. *Herron*, 4 Munf. 316.

SEC. 34. *Setting aside sale—Selling property en masse.*—Here the directions of the power must be complied with. If the trustee has a discretion he must not abuse it: *Supra* sec. 20. If by the terms of the trust a right to sell in parcels is *excluded*, it should not be sold in parcels: *Quarles* vs. *Lacy*, 4 Munf. 25. If the debtor has not provided for a sale in parcels, a sale of the entire tract will not be set aside unless the trustee had a discretion to sell less and abused it: *Singleton* vs. *Scott*, 11 Iowa 589; 1 Hill on Trust 143. Where the power is "to sell together *or* in lots," the debtor can object to a sale *en masse*, unless fraud was worked or great loss occasioned: *Turner* vs. *Johnson*, 10 Ohio 204; s. c. 7 Id. 216, part 2; *Lamerson* vs. *Marvin*, 8 Barb. 9; Although advertised as an entirety, the trustee may, in the exercise of a wise discretion, sell in parcels: *Gray* vs. *Howard*, 14 Mo. 341. If there is a discretion to sell in parcels, a failure to exercise it wisely would not, according to WRIGHT, C. J. (*arguendo*), 11 Iowa 597, "vitiate the title of the party purchasing, who was ignorant of what would be most for the interest of the beneficiary. The trustee might be liable for an abuse of the trust, but the sale would not be invalid."

SEC. 35. *Setting aside sale because of purchase by mortgagee or trustee.*—Where the power to sell is conferred upon a third person the *cestui que trust* may purchase as freely as any other person: *Lyon* vs. *Jones*, 6 Humph. 533, substantially overruling *Wade* vs. *Harper*, 3 Yerg. 383; *Walker* vs. *Brungard*, 13 Sm. & Mar. 723. But as the mortgagee cannot convey to himself he cannot, without

an enabling statute, purchase at a sale made by himself: *Arnot* vs. *McClure*, 4 Denio 41; *Jackson* vs. *Colden*, 4 Cowen 266; 1 Paige 48; 16 Barb. 347; *Huff* vs. *Earle*, 3 Port. (Ind.) 306; 7 Id. 699; Lead. Cas. in Eq. 150; *Nichols* vs. *Baxter*, 5 Rh. Island 491; 4 Met. 325; 3 Id. 311; *Hyndman* vs. *Same*, 19 Verm. 9; 9 Verm. 164; nor can he procure another to purchase for him: *Pettibone* vs. *Perkins*, 6 Wis. 616; *contra*, *The Howards* vs. *Davis*, 6 Texas 174. The trustee cannot buy at his own sale directly or indirectly, or from the grantor: 3 Humph. 442; *Bailey* vs. *Robinson*, 1 Gratt. 4; *Robbins* vs. *Butler*, 24 Ill. 387; 2 Dev. (Eq.) 292; 3 Jones (Eq.) 17; 3 Ired. (Eq.) 330; *Saltmarsh* vs. *Beene*, 4 Port. (Ala.) 283; 1 Stockt. 218; 11 Foster 70; 3 Harr. 74; 1 Halst. Ch. 319. A sale to his partner, though for a fair price (3 Yerg. 201), or to his co-trustee (1 Har. & Gill.), will be set aside. If he buys in a prior incumbrance on the trust estate it will enure to the benefit of the *cestui que trust*, the trustee being reimbursed: *Critchfield* vs. *Haynes*, 14 Ala. 49; 16 Id. 616; *Gunter* vs. *Jones*, 9 Cal. 643. Where the mortgagee or trustee buys at his own sale, the right of redemption still attaches: *Hyndman* vs. *Same*, 19 Verm. 1; *Benham* vs. *Rowe*, 2 Cal. 387.

But the trustee's purchase at his own sale is not void, and the beneficiary may repudiate it or hold him to it: *Pitt* vs. *Petnay*, 12 Ired. (Law) 69; 7 Id. (Eq.) 150; 9 Rich. (Eq.) 223. Third persons cannot make the objection or complain: *Edmondson* vs. *Welsh*, 27 Ala. 578. Such purchase being voidable simply, the grantee of the trustee for value and without notice will obtain a good title: *Robbins* vs. *Bates*, 4 Cush. 104. Even the trustee's title may be ratified by knowledge and acquiescence beyond a reasonable time: *Scott* vs. *Freeland*, 7 Sm. & Mar. 409. It is no ground for setting aside the sale (there being no fraud or collusion) that the trustee knew that the purchaser was bidding for the beneficiary (*Lucas* vs. *Oliver*, 34 Ala. 626), or that the creditor requested the auctioneer to bid for him a certain sum. But it would be otherwise if the auctioneer was employed to buy for the creditor as low as possible: *Richards* vs. *Holmes*, 18 How. 143.

SEC. 36. *Bill to set aside sale—Onus of proof.*—On a bill by

trustor or his heirs against trustees and purchasers to set aside the sale for want of due notice, the *onus* of proving that proper advertisement was made is on the parties who insist upon or claim under the sale: *Gibson* vs. *Jones*, 5 Leigh 370; *Norman* vs. *Hills*, 2 Patt. & Heath 676; *supra*, sec. 31. And, aside from special statute, this must be shown by common law evidence: *Arnot* vs. *McClure*, 4 Denio 41; 5 Paige 104.

SEC. 37. *When sales will not be set aside—Waiver—Estoppel.*—There are cases where, though the power has not been strictly followed or has been exceeded, the sale will not be set aside, as where the sale has been acquiesced in, the property having brought full value, the purchaser having made improvements and the parties seeking relief having been negligent. Such cases stand on special grounds. As examples, see 3 Leigh 654; *Taliaferro* vs. *Minor*, 1 Call 524; *Caldwell* vs. *Chapline*, 11 Leigh 342; 5 Id. 391; *Pierce* vs. *Twiggs*, 10 Leigh 406, where infants ineffectually sought relief from an irregular sale.

So waiver and estoppel apply to such sales. As limitations on the power are for the benefit of the debtor the latter may waive them, and he is estopped from objecting that a duty has not been done which he himself prevented: *Beebe* vs. *De Baum*, 3 Eng. 510; *Greenleaf* vs. *Queen*, 1 Pet. 138; *Echols* vs. *Dinick*, 2 Stew. 144; *Foster* vs. *Goree*, 5 Ala. 428; 11 Ala. 514; *Gift* vs. *Anderson*, 5 Humph. 577; 14 Verm. 268; *Hall* vs. *Harris*, 11 Texas 300; 4 Ired. (Eq.) 288. So irregularities in the mode of sale will be waived by the debtor if he is present and does not object: *Lamb* vs. *Goodwin*, 10 Ired. (Eq.) 320; *Chowning* vs. *Cox*, 1 Rand. 306; 3 Leigh 654.

In *Greenleaf* vs. *Queen*, above cited, the *purchaser* objected that the trustee had not complied with the requirements of the power, but the Court replied that as the grantor and beneficiaries waived all objection no one else could complain. So a stranger or one who shows no interest in the property cannot object to irregularities of the trustee in the execution of the power: *Hannah* vs. *Carrington*, 18 Ark. 85; *Foster* vs. *Goree*, 5 Ala. 428; *Bayard* vs. *Colefax*, 4 Wash. C. C. R. 38; 16 Ala. 581; *supra*, sec. 28.

In favor of meritorious claimants and innocent purchasers the presumption is in favor of a valid exercise of the power: *Wilburn* vs. *Spofford*, 4 Sneed 704.

SEC. 38. *When bill to set aside sale will not lie—Bill to redeem.*—It was held in *Goldsmith* vs. *Osborne*, 1 Edw. Ch. 560, followed by *Schwarz* vs. *Sears*, Walk. Ch. 170, that a mortgagor cannot maintain a bill to have the *sale set aside* and the property resold, although the mortgagee may have abused the power to sell and bought in the property himself. Both cases hold that his only remedy is a bill to redeem, offering to pay any amount found or admitted to be due.[1]

SEC. 39. *When equity will restrain sale—General principles—Infants—Special circumstances—Disputed debt or title.*—Generally what would be good ground for setting aside a sale will be good ground to restrain a sale. The powers and duty of the trustee having been so fully set forth, as well also the reasons for which sales will be set aside, it need only be remarked that if the trustee or creditor is acting in bad faith or transcending his power, equity will enjoin. Indeed some of the courts have held that technical or formal defects not involving substantial equities will not be regarded if the debtor has stood by and made no attempt to arrest the sale: *Doolittle* vs. *Lewis*, 7 Johns. Ch. 45, 50; 10 Johns. 185, 196.

In favor of an *infant* heir, Chancellor KENT directed the sale to be made under the direction of a master and further notice to be given: *Van Bergen* vs. *Demarest*, 4 Johns. Ch. 37.

Generally no injunction will issue if trustee is only exercising in a fair manner his legal rights: *York, &c., R. R. Co.* vs. *Myers*, 41 Maine 109. Yet Chancellors under special circumstances, where no damage would be done to the creditor and where otherwise great loss would ensue to the debtor, have *indulged* the latter

[1] We should doubt the entire correctness of these decisions. It is doubtless true that the debtor would have no right to file a bill to have the property sold or resold. But why should a bill not lie to set aside an improper and fraudulent sale, leaving the creditor the right to make a new sale or file cross-bill to foreclose? If not set aside, his grantee for value and *bonâ fide* would hold. See very similar case of *Driver* vs. *Fortner*, 5 Port. (Ala.) 9, where the court set aside the sale. The books abound in cases where sales have been set aside.

with an injunction for a short, limited period. Thus in *Platt* vs. *McClure*, 3 Wood. & Min. 151, a temporary writ was granted allowing reasonable time to raise the money where the plaintiff, belonging to another state, bought the premises subject to certain mortgages, not recorded, in ignorance that they contained powers of sale.

Approving the remark of Lord ELDON, that it is the duty of the trustee "to bring the estate to the hammer under every possible advantage," the courts hold that it is the duty of the trustee to refuse to sell while clouds are hanging over or disputes concerning the title exist, which would prevent a sale at the full or fair value of the property. If the trustee fails thus to do his duty equity will enjoin, or in a proper case set aside his sale. This relief will be afforded to any person injured—the debtor or his assigns, a creditor or subsequent incumbrancers. Applying these principles, if the trustor has only an equitable title, but is entitled to the legal title, the trustee should not sell before getting in the latter title. And it is even held that in case of a disputed title equity will enjoin, even if the state of the title was known to all the parties when the trust deed was executed. So the trustee should not sell and will be enjoined if the debt is unliquidated and disputed, but in this case if anything is admitted to be due the debtor applying for the writ must tender or bring the admitted amount into court. The amount due should be definitely fixed before sale, otherwise the creditor must file bill. As authority for the foregoing, see *Lane* vs. *Tidball*, 1 Gil. (Va.) 130; *Johnson* vs. *Eason*, 3 Ired. (Eq.) 330; *Gibson* vs. *Jones*, 5 Leigh 370 (amount of debt disputed); *Rossett* vs. *Fisher*, 11 Gratt. 499 and cases; *James* vs. *Gibbs*, 1 Patt. & Heath 277; *Hunt* vs. *Bass*, 2 Dev. (Eq.) 292; *Fisher* vs. *Bassett*, 9 Leigh 119; *Miller* vs. *Argyle*, 5 Leigh 460; *Gay* vs. *Hancock*, 1 Rand. 72; *Ord* vs. *Noel*, 5 Mad. 440; 2 Rob. (Va.) 1; *Wilkins* vs. *Gordon*, 10 Leigh 547, where the trust deed was to secure a debt "in and *about* $2000," and the Court held that the amount should be precisely ascertained before sale; *Peck* vs. *Peck*, 9 Yerg. 301; *Cole* vs. *Savage*, Clark (N. Y.) R. 361.

On similar grounds, equity will temporarily enjoin, if thereby

new and further litigation will be avoided: 16 Vesey 267. But a sale will not be stayed until the different owners of the equity of redemption shall settle what amount or proportion each is to contribute. They must pay the whole debt, and adjust their rights afterwards. Yet, in a proper case, the Court will direct the order of sale of the various parcels: *Brinckerhoff* vs. *Lansing*, 4 Johns. Ch. 65; 1 Id. 447, 425.

If the whole debt is contested on the ground of usury, equity will enjoin until its validity is established: *Marks* vs. *Morris*, 2 Munf. 407. If any amount is admitted to be due by the bill asking for an injunction, it must be tendered before the writ will be granted: *Sloan* vs. *Coolbaugh*, 10 Iowa 30; 7 Id. 33; 11 Id. 242.

SEC. 40. *Surplus—To whom distributed—Rights of debtor and lien-holders.*—Contests about the surplus remaining after a sale are of frequent occurrence. Space does not allow an extended discussion. We indicate some of the more important principles, referring to the authorities cited for their application and illustration.

As a sale on a second deed of trust does not exonerate the property from the lien of the first, any surplus from a sale on the second deed will be applied in payment of the third, and not of the first: *Helweg* vs. *Heitcamp*, 20 Mo. 569.

If there are no subsequent liens, the surplus belongs to the grantor or his assigns: *Goulden* vs. *Buckelew*, 4 Cal. 107; *Pierce* vs. *Robinson*, 13 Id. 116; see also cases cited *infra*. In this country the surplus goes to the heirs, and is assets: 1 Johns. Ch. 119.[1] Representing the equity of redemption, the widow is dowable in it: *Hinchman* vs. *Stites*, 1 Stockt. 454. The debtor may assign this surplus, but not so as to defeat liens on the land existing at the time of the assignment: *Doniphan* vs. *Paxton*, 19 Mo. 288; *Palmer* vs. *Yarborough*, 1 Ired. (Eq.) 310.

Judgments, in most of the States (*supra*, sec. 11, and note), are liens upon the residuary interest of the trustor, subject to the in-

[1] In a recent case in Illinois, the Supreme Court, after holding that judgments were liens on the grantor's equity of redemption, decided that the general executor of the debtor was entitled to the surplus in preference to the judgment-creditors: *Pahlman* vs. *Shumway*, 24 Ill. 127. With great deference it is submitted that this conclusion is untenable.

cumbrance of the deed of trust. And sales under the latter cut off the former.

Although the decisions are not in full accord, the weight of authority and the better opinion will warrant the following propositions: that to entitle the judgment-creditor to a lien on or to follow the surplus, his judgment or execution must be a lien on the premises; if thus a lien, he has a right to follow the surplus, and this right cannot be destroyed or postponed by levy or garnishment on behalf of a subsequent judgment-creditor; but the surplus will be distributed in the order of the liens, whether by judgment or mortgage, on the land out of which it arose: *Bodine* vs. *Moore*, 18 N. Y. 347; *Calkins* vs. *Isbell*, 20 Id. 152; *White* vs. *Watkins*, 23 Mo. 429; *Doniphan* vs. *Paxton*, 19 Id. 288; *Kennedy* vs. *Hammond*, 16 Id. 341; *Cook* vs. *Dillon*, 9 Iowa 407; *Pahlman* vs. *Shumway*, 24 Ill. 127; *Presnell* vs. *Landers*, 5 Ired. (Eq.) 251; *Harrison* vs. *Battle*, 1 Dev. (Eq.) 541; 31 Miss. 128; 1 Ired. (Eq.) 310; *Chase* vs. *Parker*, 14 Iowa (not yet reported); *Bartlett* vs. *Gage*, 4 Paige 503; 1 Id. 181, 558, 635; *Averill* vs. *Loucks*, 6 Barb. S. C. R. 470; *Eddy* vs. *Smith*, 13 Wend. 488; *Waller* vs. *Harris*, 7 Paige 167; s. c., 20 Wend. 555. If there are no such liens, and it has not been assigned, it may, of course, be attached, garnisheed, or otherwise reached in the hands of the trustee as the debtor's: *Heam* vs. *Crutcher*, 4 Yerg. 461; Hill on Trust. 344, note and cases.

It is stated, *arguendo*, in *Cook* vs. *Dillon*, *supra*, that the trustee is not bound to take notice of or search for subsequent judgments or liens, and that if such lien-holders do not notify him of their rights, he will be without fault and without liability, if he pays the surplus over to the creator of the trust. J. F. D.

Davenport, Iowa.